

**FEDERAL REGISTER: 51 FR 11720 (April 7, 1986)**

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Part 870

Abandoned Mine Reclamation Fund; Fee Collection and Coal Production Reporting

ACTION: Notice of decision on petition for rulemaking.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) makes available to the public its final decision on a petition for rulemaking from the United States Fuel Company (U.S. Fuel). The petition requests that OSMRE modify its definition of "reclaimed coal" contained in 30 CFR 870.5. On March 31, 1986, the Director made a decision denying the petition.

**ADDRESS:** Copies of the petition, and other relevant materials comprising the administrative record of this petition are available for public review and copying at OSMRE, Administrative Record, Room 5124B-L, 1100 L Street, NW., Washington DC.

**FOR FURTHER INFORMATION CONTACT:** Richard O. Miller, Chief, Regulatory Development and Issues Management, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Ave., NW., Room 134, Washington, DC 20240. Telephone (202) 343-5546.

**SUPPLEMENTARY INFORMATION:**

**I. PETITION FOR RULEMAKING PROCESS**

Pursuant to section 201(g) of the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1201* et seq., any person may petition the Director of OSMRE for a change in OSMRE's regulations. Under the applicable regulations for rulemaking petitions, 30 CFR 700.12, the Director must first determine whether the petition has a reasonable basis. If the petition has a reasonable basis, notice is published in the Federal Register seeking comments on the petition and the Director may hold a public hearing, conduct an investigation, or take other action to determine whether the petition should be granted. If the petition is granted, the Director initiates a rulemaking proceeding. If the petition is denied, the Director notifies the petitioner in writing setting forth the reasons for denial. Under Section 700.12(d), the Director's decision constitutes the final decision for the Department of the Interior.

**II. THE UNITED STATES FUEL COMPANY PETITION**

OSMRE received a letter dated July 5, 1985, from the United States Fuel Company (U.S. Fuels) presenting to the Secretary of the Interior a petition for further interpretation of the definition of "reclaimed coal" contained in 30 CFR 870.5. After determining that the petition had sufficiently reasonable basis to seek further comments, the Director published the petition in the Federal Register (*50 FR 36858*) requesting public comment. The comment period began September 9, 1985, and was closed on October 18, 1985. Five persons submitted written comments during the public comment period.

The Director's letter response to the petitioner on this rulemaking petition appears as an appendix to this notice. This letter reports the Director's decision to the petitioner. It also contains a summary description of the issues raised by the petitioner, OSMRE's current regulatory program, an analysis of the petitioner's proposed regulatory change, and a discussion of the comments received on the petition.

Dated: March 31, 1986.

Jed D. Christensen, Director, Office of Surface Mining Reclamation and Enforcement.

## APPENDIX

The Director's response to the petition from the United States Fuel Company, is as follows:

Mr. Robert G. Pruitt, III,  
Pruitt, Gushee and Fletcher, Suite 1850 Beneficial Life Tower, Salt Lake City, Utah 84111

Re: United States Fuel Company: Petition for Rulemaking

Dear Mr. Pruitt: After careful consideration, the Office of Surface Mining Reclamation and Enforcement (OSMRE) is denying the United States Fuel Company (U.S. Fuels) Petition for Rulemaking which requested that OSMRE modify the definition of "reclaimed coal" found at 30 CFR 870.5.

### BACKGROUND

On July 5, 1985, U.S. Fuels filed a petition for rulemaking under section 201(g) of the Surface Mining Control and Reclamation Act of 1977, *30 U.S.C. 1211(g)* (SMCRA). That section allows any person to petition the Director of OSMRE to initiate a proceeding to issue, amend or repeal a rule adopted by the Secretary under SMCRA.

Title IV of SMCRA dealing with abandoned mine reclamation, creates a trust fund in the Treasury of the United States for the restoration of land and water resources and environment previously degraded by adverse effects of past coal mining practices. *30 U.S.C. 1233(3)*. The fund consists of sums collected pursuant to section 402(a) of SMCRA which provides:

“All operators of coal mining operations subject to the provisions of this Act shall pay to the Secretary of the Interior for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 percentum of the value of the coal at the mine, as determined by the Secretary, whichever is less . . .”

*30 U.S.C. 1232(a)*.

OSMRE's regulations implementing this section of the Act are found at 30 CFR Part 870. OSMRE has by regulation defined surface coal mining, underground coal mining, and reclaimed coal.

Text of OSMRE's existing regulation at 30 CFR 870.5 is as follows:

“Reclaimed coal means coal recovered from a deposit that is not in its original geological location, such as refuse piles or culm banks or retaining dams and ponds that are or have been used during the mining or preparation process, and stream coal deposits. Reclaimed coal operations are considered to be surface coal mining operations for fee liability and calculation purposes.” (Emphasis added.)

The U.S. Fuel petition seeks to modify the definition of "reclaimed coal" found at 30 CFR 870.5 with regard to production of certain reclaimed coal within the permit area of active underground operations. The proposed change would have applied to the limited circumstance where the reclaimed coal consists of coal-fines which are washed out during processing at an on-site preparation plant, as part of an active underground mining operation. Under the modification, the reclaimed coal-fines would be treated as underground mined coal, and the fee rate of 15 cents per ton would apply.

Pursuant to the applicable regulations for rulemaking petitions, 30 CFR 700.12(c), the Director published a notice of the petition in the Federal Register seeking comments from the public on the proposed change. The comment period closed on October 18, 1985. See, *50 FR 36858*, September 9, 1985.

### BASIS FOR DECISION

A number of factors form the basis for OSMRE's decision. Of primary concern to OSMRE is the adverse effect any change in definition would have on regulatory stability. OSMRE has been collecting abandoned Mine Reclamation fees

since 1977. Such collection will end in 1992. Any change to the definition at this time will generate uncertainty for all remaining operations and may result in a flurry of new legal challenges and requests for recalculation of fee amounts. Moreover, OSMRE's existing reclaimed coal regulations have been subjected to Federal court review and have been repeatedly upheld. For instance, the Court of Appeals ruling in *U.S. v. Devil's Hole, Inc.*, 747 F.2d 895 (3d Cir. 1984), concerning remaining of pre-Act anthracite silt deposits, upheld the Secretary's reclaimed coal regulations as being consistent with the Surface Mining Control and Reclamation Act of 1977 (SMCRA). See also *U.S. v. Consolidation Coal Co.*, infra. OSMRE's regulations are also consistent with the Internal Revenue Service (IRS) definition of "coal produced from a surface mine" found at 26 CFR 48.4121-1(d). The I.R.S. regulations, which are used for calculating Black Lung Tax, provide that coal reclaimed from coal waste refuse piles be treated as produced from a surface mine.

OSMRE's rule defining "reclaimed coal" was adopted in June 1982. The petition states that U.S. Fuel has marketed coal slurry since 1975. Although U.S. Fuel had a stake in the development of this regulation, it neglected to participate in the rulemaking process. The current definition of "reclaimed coal" was not challenged within the 60 days after being promulgated as required by section 526(a) of SMCRA. Thus the procedural attacks on the current rule included in U.S. Fuel's petition should have been raised in a direct challenge to the rule at the time the rule was promulgated and will not be considered at this time.

To justify a change in the current rule, OSMRE is obligated to supply a reasoned analysis for the change. See, *Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 4433 (1983). OSMRE does not agree that the several arguments set forth in U.S. Fuel's petition recommending the rule change are sufficient to support a change in agency regulation. The change in the regulation which U.S. Fuel now seeks is more in the nature of a private remedy than an improvement to the regulatory scheme.

Under U.S. Fuel's suggested modification, a lesser amount of total fees would be deposited in the abandoned Mine Land (AML) fund with no resulting increase in lands reclaimed. Without such an offset, little justification exists for reducing moneys available for reclamation. Revenue enhancement for this fund is important so as to further the purposes of SMCRA and maximize moneys available to reclaim abandoned mined lands. See, sections 101(b), 102(a) and 102(h) of SMCRA.

U.S. Fuel alleges that a lower fee rate would encourage the recovery of the coal slurry and thus reduce the environmental costs associated with the construction, maintenance, and reclamation of its sedimentation ponds. Although a lower fee may act as an incentive for U.S. Fuel's slurry sales, no additional incentive would be created for remaining lands which would not otherwise be reclaimed. Under Title V of SMCRA, U.S. Fuel is already obligated to reclaim ponds located within the permit area. Thus, there would be no corresponding reduction in national environmental reclamation costs to match a reduction in reclamation fees.

U.S. Fuel also contends that a lower fee rate will "promote recovery of the coal resource." The petition explains how U.S. Fuel has been able to capitalize on the use of its slurry by mixing it with run-of-mine coal to meet existing contract requirements. U.S. Fuel makes no allegations that the practice of mixing slurry is financially dependent upon securing a lower fee rate. Contrary to what U.S. Fuel says, a strong incentive already appears to exist for recovery and use of the coal slurry. The petition itself points out that if U.S. Fuel did not mix the slurry with the higher grade underground coal to fulfill its contracts, the extra coal quality would be wasted. Mixing of slurry with run-of-mine coal appears to be prudent business practice for U.S. Fuel independent of OSMRE's reclamation fee schedule.

U.S. Fuel also alleges that little or no market value exists for this coal slurry without the adjacent underground mining operation. In formulating the fee schedule, Congress considered the possibility of operators mining coal of minimal value and provided these operators with the option of paying a reclamation fee at the rate of "10 per cent of the value of the coal at the mine." 30 U.S.C. 1232. In doing so, Congress has determined that the current fee schedule would not otherwise act as a disincentive for recovery of lower grade coal. U.S. Fuel retains the option of paying fees based on the value of the coal produced.

U.S. Fuel's last argument is that because the coal slurry is a byproduct of underground mining operations the fee for coal produced by underground mining methods should apply. This argument must also fail. The coal produced from the slurry is not produced by underground mining methods. Under OSMRE's regulations, U.S. Fuel's coal is "produced" when the slurry is dredged and separated from the accompanying waste material. These are not underground extraction

techniques. Under the rules, reclamation fee liability attaches at the time of the first transaction (sale or transfer of ownership) or use of the coal by the operator immediately after it is removed from a reclaimed coal refuse deposit. 30 CFR 870.12(b)(1). Courts reviewing this issue have consistently held that remined coal is produced at the time of the remaining operation. In a recent Federal court decision, the court reemphasized that Congress intended to impose a reclamation fee on "those who gain an economic benefit from the coal when they gain the advantage." U.S. v. Consolidation Coal Co., C.A. No. 82-1077 (S.D. W.Va., Nov. 7, 1985); U.S.A. v. Sam Kennedy, C.A. No. CV 82-4234 (S.D. Ill., Feb. 24, 1984); U.S.A. v. Hecla Machinery and Equipment Company, C.A. No. 80-4554; U.S.A. v. Devil's Hole, Inc., C.A. No. 40-4553 (E.D. Pa., Dec. 29, 1983); U.S. v. S.S. Burford, Inc., C.A. No. 82-385-E (N.D. W. Va., June 6, 1983).

U.S. Fuel's process for removing the coal from the slurry ponds is no different than numerous anthracite silt recovery operations in the eastern United States. These are "surface-mining" methodologies, requiring a substantially more modest capital investment than underground mines. Congress noted this difference in operating costs when formulating the reclamation fee schedule. Congress intended that the fee rate take into consideration the "disproportionately high social costs incurred by underground coal mine operators in meeting responsibilities under the Coal Mine Health and Safety Act of 1969 . . ." H.R. Rep. No. 218, 95th Cong., 1st Sess. 137, reprinted in 1977 U.S. Code Cong. & Ad. News 509, 669. Thus, OSMRE's determination that reclaimed coal should be treated as surface mined coal is consistent with the intent of Congress.

OSMRE received comments on the petition from several sources. The majority of the commenters, all but one of which were coal operators having a self-interest in reducing their fee payments, supported a lower fee for reclaimed or remined coal. Several commenters suggested that OSMRE look to the source of the coal in assessing fee rates. As discussed earlier, courts have upheld OSMRE's position regarding time of production and have discarded the argument repeatedly made by operators that the source of the coal should control. Also, commenters asserted that a rule change would provide an incentive for remining lands which would not otherwise be reclaimed. Although possibly a valid consideration in a more general proceeding, it does not apply to U.S. Fuel's narrow petition only concerning slurry remined within the permit area of an ongoing underground operation. Operators who would benefit from this suggested rule change are already obligated to reclaim all disturbances within their permit areas. Several commenters stated that the 35 cent-per-ton surface rate would adversely affect remining of lower-valued coal refuse. No documentation has been produced to demonstrate that the 35 cent-per-ton fee has rendered the remining of coal uneconomical. And, as discussed earlier, Congress recognized potential disparities in market value by allowing payment of 10 percent of the value of the coal for operators mining low-value coal. See, 30 CFR 870.13(a), (b).

For all of the foregoing reasons, OSMRE denies U.S. Fuel's petition filed with the Director on July 5, 1985, and declines to modify the existing definition of "reclaimed coal" set forth at 30 CFR 870.5. Under 30 CFR 700.12(d), this letter constitutes a final decision of the Interior Department.

Sincerely,  
Jed D. Christensen,  
Director.

[FR Doc. 86-7596 Filed 4-4-86; 8:45 am]  
BILLING CODE 4310-05-M